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SPLIT DECISIONS IN CHILD PORNOGRAPHY RESTITUTION CASES FURTHER INJURE THE VICTIMS

*Melisa Medina**

INTRODUCTION

“It started like so many other instances of child exploitation: Amy’s uncle showed her pornography and then began raping her on a regular basis.”¹ Child pornography has been a despicable tragedy for many years. The distribution of child pornography has “grown exponentially” because of the accessibility of the internet.² Images of child pornography create a permanent record of a child’s abuse. Congress enacted the Mandatory Restitution for Sexual Exploitation and Other Abuse of Children section under the Violence Against Women Act (VAWA) of 1994 (18 U.S.C.A. § 2259) in order to mandate that the child pornography viewer pay the “full term of the victim’s losses.”³ Court

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¹ Lorelei Laird, *Pricing Amy: Should Those Who Download Child Pornography Pay the Victims?*, ABA Journal (Sept. 1, 2012, 5:30 AM); http://www.abajournal.com/magazine/article/pricing_amy_should_those_who_download_child_pornography_pay_the_victims.

² Brief of the National Center for Missing and Exploited Children as Amicus Curiae in Support of Petitioner at 3, *Amy v. Monzel*, 641 F.3d 528 (2011) (No. 11-85).

³ 18 U.S.C.A. § 2259 (West 1996), stating:

(a) In general.—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order.—

(1) Directions.—The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.—For purposes of this subsection, the term “full amount of the victim’s losses” includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

decisions have been divided when applying section 2259 because of the issue on whether the victim's losses must be proximately caused by the possession of the pornography.⁴ Many courts also question how to determine the amount of restitution to be paid.⁵ The division within the courts adds to the uncertainty for the child pornography victims. It seems likely that if child pornography offenders are consistently penalized harshly for possessing and viewing the images, the demand for child pornography would decrease.⁶ The intention of the statute is clear; yet, the application of the statute has left much confusion and uncertainty for the courts and the victims alike. .

Part I of this note will discuss the harm that child pornography does to the victims, and society as a whole. Part II will provide an overview of the important acts that led to the passage of section 2259. Part III will analyze the proximate cause requirement and the split court decisions. Part IV will discuss the calculations of restitution and the issue of whether joint and several liability should be applied. Finally, Part V will suggest possible alternatives to create consistencies across the courts.

THE HARM CHILD PORNOGRAPHY INFLICTS ON VICTIMS AND SOCIETY

Victims of child pornography have long-lasting scars. Not only do victims have to overcome the horror of the act(s), but they now have to deal with the looming question as to whether that crime was recorded and distributed in the black market world of child pornography. One victim, Ms. X, described her feelings, explaining what she lives every day:

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.—(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition.—For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

⁴ Laird, *supra* note 1.

⁵ *United States v. Tallent*, 872 F. Supp. 2d 679, 681 (E.D. Tenn. 2012).

⁶ Tyler Morris, *Perverved Justice: Why Courts are Ruling Against Restitution in Child Pornography Possession Cases, and How a Victim Compensation Fund Can Fix the Broken Restitution Framework*, 57 VILL. L. REV. 391, 391 (2012) (discussing the problems of the restitution framework as it currently stands).

with the horrible knowledge that someone somewhere is watching the most terrifying moments of my life and taking grotesque pleasure in them. . . Everyday people are trading and sharing videos of me as a little girl being raped in the most sadistic ways. . . They're being entertained by my shame and pain. . . [The knowledge that my images are being circulated on the internet] has given me a paranoia.⁷

Child pornography is essentially a set of crime scene photos that are a permanent record of the crime committed against the child.⁸ “Once these images are on the Internet, they are irretrievable and can continue to circulate forever. The child is re-victimized as the images are viewed again and again.”⁹ It is unclear how far back child pornography images began circulating, but court records have shown that images date back to 1998.¹⁰

The court in *United States v. Klein*, stated that “as a permanent record of a child’s abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child’s reputation and emotional well-being.”¹¹ One court indicated that victims of child pornography suffer harm in three ways. The first harm is that the images have been disseminated and become a permanent record of the abuse.¹² The second harm is the invasion of the victim’s privacy.¹³ The third harm is that the consumer of child pornography prompts additional production, and an economic motive, for producing and distributing more pornographic materials.¹⁴ One victim, Amy, explained that she was unable to get over the abuse that she suffered at the hands of her uncle because the “disgusting images of what he did to [her] are still out there on the internet.”¹⁵ Another victim described the viewing and trading of child pornography as synonymous with “trading my trauma around like

⁷ *United States v. McDaniel*, 631 F.3d 1204, 1206 (11th Cir. 2011).

⁸ What is Child Pornography?, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, http://bannerb.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2451 (lasted visited March 11, 2013).

⁹ *Id.*

¹⁰ Laird, *supra* note 1, at 1.

¹¹ *United States v. Klein*, 829 F. Supp. 2d 597, 604 (S.D. H Ohio 2011).

¹² *United States v. Hagerman*, 827 F. Supp. 2d 102, 110 (N.D.N.Y. 2011) *rev'd and remanded*, 506 F. App'x 14 (2d Cir. 2012) (citing, *U.S. v. McDaniel*, 631 F.3d 1204, 1208 (11th Cir.2011)).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *United States v. Aumais*, 656 F.3d 147, 149 (2d Cir. N.Y. 2011).

treats at a party.”¹⁶ Some of these victims suffer night terrors, panic attacks, depression, alcohol abuse, a reluctance to socialize, and an inability to finish college or hold employment.¹⁷ Psychologists have recognized that the victim’s knowledge of the disseminated pornographic images are a significant part of the victimization.¹⁸

In 2010, the Crime Victim Identification Program conducted over 4,800 evidence reviews containing more than 13.6 million images of child pornography.¹⁹ The National Center for Missing and Exploited Children has identified and reported over 35,570 images of Amy, the victim.²⁰ This epidemic is not going away—it is getting stronger. Victims of child pornography suffer severe harms from the “permanent memorialization” of the crime.²¹ An expert classified the type of trauma to be a Type II trauma, which is equivalent to the type of trauma suffered by people who lived near a war zone.²² Victims are further injured because of their inability to remove the images that are circulating on a daily basis.²³ Some victims are concerned about being recognized in public by the offenders that have downloaded the images of their abuse.²⁴ One victim was being harassed and stalked by an offender who made attempts to contact her asking if she would be willing to make a pornographic video with him.²⁵ Another victim was stalked by a man who admitted that he had searched for her for five years on the internet.²⁶

Under the Crime Victims’ Rights Act (CVRA), victims of child pornography must be notified by the government any time a person is arrested for possessing their images.²⁷ Upon receiving the notifications,

¹⁶ *United States v. Ontiveros*, No. 2:08-CR-81 JVB, 2011 WL 2447721, at *4 (N.D. Ind. June 15, 2011).

¹⁷ *Pricing Amy and United States v. Kennedy*, 634 F.3d 1251, 1255 (9th Cir. 2011).

¹⁸ *Ontiveros* at 4.

¹⁹ Brief of the National Center for Missing and Exploited Children as Amicus Curiae in Support of Petitioner at 4, *Amy v. Monzel*, 641 F.3d 528 (2011) (No. 11-85).

²⁰ *Morris*, *supra* note 6, at 395, 396.

²¹ Brief of the National Center for Missing and Exploited Children as Amicus Curiae in Support of Petitioner at 9, *Amy v. Monzel*, 641 F.3d 528 (2011) (No. 11-85).

²² *United States v. Kearney*, 672 F. 3d 81, 87 (1st Cir. 2012).

²³ Brief of the National Center for Missing and Exploited Children as Amicus Curiae in Support of Petitioner at 12, *Amy v. Monzel*, 641 F.3d 528 (2011) (No. 11-85).

²⁴ *Laird*, *supra* note 1, at 5.

²⁵ *Kearney*, 672 F. 3d at 86-87.

²⁶ *United States v. Strayer*, No. 8:08CR482, 2010 WL 2560466 at *3 (D. Neb. June 24, 2010).

²⁷ *Laird*, *supra* note 1, at 2; *see also*, 18 U.S.C.A. § 3771 which states the crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

the doctor for a victim named Vicky, compared the trauma to represent “a chronic, toxic condition . . . which continuously works like corrosive acid on the psyche of the individual.”²⁸ Vicky explained that the notifications are an everyday reminder that someone is watching “the most terrifying moments of my life and taking grotesque pleasure in them.”²⁹ Technology today not only enables offenders to commit crimes more easily, but it also “amplifies the nature of the harm done to the victim and the number of offenders doing harm to a particular victim.”³⁰ The harm to the victim is not in dispute; what is in dispute is how to create a deterrent for offenders that will be consistent and effective.

ACTS THAT HAVE LED TO THE PASSAGE OF 18 U.S.C.A. § 2259

Historically, restitution was an “offender-based remedy” that was used to promote the rehabilitation of the offender.³¹ In the 1970’s, there was a movement to have victims more involved in the prosecution of their offenders: although, it wasn’t until the 1980’s that protection for child pornography statutes began to appear.³² A report by President Ronald Reagan’s Task Force on Victims of Crime in 1982, observed that the “pleas for justice [by victims] have gone unheeded.”³³ One of the

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.

²⁸ *Kearney*, 672 F. 3d at 87.

²⁹ *McDaniel*, 631 F.3d at 1206.

³⁰ Brief of the National Center for Missing and Exploited Children as Amicus Curiae in Support of Petitioner at 15, *Amy v. Monzel*, 641 F.3d 528 (2011) (No. 11-85).

³¹ Robert William Jacques, Note, *Amy and Vicky’s Cause: Perils of the Federal Restitution Framework for Child Pornography Victims*, 45 GA. L. REV. 1167, 1176 (2011) (discussing the history of restitution and the changes made to become more victim focused).

³² *Id.* at 1177.

³³ *Id.*; *Final Report of the President’s Task Force on Victims of Crime*, OFFICE OF JUSTICE PROGRAMS: OFFICE FOR VICTIMS OF CRIME, available at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/welcome.html>. (“President Ronald Reagan created the President’s Task Force on Victims of Crime in 1982 to address the needs of the millions of Americans and their families who are victimized by crime every year. In creating its report, the task force reviewed the available literature on criminal victimization, interviewed professionals responsible for serving victims, and spoke with citizens from around the country whose lives have been altered by crime.”).

major goals in the victims' rights movement was to expand the restitution mechanism to be more of a means to compensate and make the victim whole from the losses accrued from the actions of the offender.³⁴ In 1982, the Victim Witness Protection Act (VWPA) allowed courts to impose restitution for victims and required the victim to prepare a "victim impact statement" to assess the effect of the defendant's crime on the victim.³⁵

"Congress . . . has recognized the unique and pervasive harms inflicted by the production, distribution, and possession of child pornography, and has acted repeatedly to combat this growing contagion."³⁶ To combat this concern, Congress passed the Child Pornography Prevention Act of 1996 (codified as amended at 18 U.S.C. § 2251).³⁷ Congress recognized the harm to children by stating that

³⁴ *Id.* at 1178.

³⁵ Restitutional Sentencing under Victim and Witness Protection Act § 5, 18 U.S.C.A. §§ 3579, 3580 (1996) stating: The Act amended Rule 32 of the Federal Rules of Criminal Procedure, hereinafter referred to as Rule 32, to require the preparation of a victim impact statement as part of the presentence investigative report, to assess the effect of the defendant's crime on the victim. Rule 32(c)(2)(C), as amended, provides that the presentence report shall contain (1) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and (2) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense. However, effective November 1, 1986, Rule 32(c)(2) has been amended further to provide that such information concerning the victim must be verified and stated in a "nonargumentative style."

³⁶ Brief on Petition for a Writ of Certiorari for Amy, the Victim in the "Misty" Child Pornography Series at 7.

³⁷ Brief on Petition for a Writ of Certiorari Amy, the Victim in the "Misty" Child Pornography Series at 8, *see also*, statute 18 U.S.C. § 2251 for defining the sexual exploitation of children as:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of

“child pornography permanently records the victim’s abuse, and its continued existence causes the victims of sexual abuse continuing harm by haunting those children in future years.”³⁸ Earlier, Congress had enacted the Violent Crime Control and Law Enforcement Act in 1994, which ordered guilty defendants to pay restitution for certain crimes, including the exploitation of children.³⁹ Though not all earlier acts passed to protect victims mandated restitution, Congress saw the need for restitution when it passed the Mandatory Victim Restitution Act (MVRA) of 1996.⁴⁰ The MVRA governs restitution awards to child pornography victims and directs the defendant to pay the victim “the full amount of the victim’s losses.”⁴¹

A victim is defined in the statute as “the individual harmed as a result of a commission of a crime under this chapter.”⁴² Courts have recognized that a victim of child pornography possession constitutes a “victim” according to the definition in the statute.⁴³ As for the remedy,

such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

³⁸ Brief on Petition for a Writ of Certiorari for Amy, the Victim in the “Misty” Child Pornography Series, at 8.

³⁹ Ashleigh B. Boe, *Putting a Price on Child Porn: Requiring Defendants Who Possess Child Pornography Images to Pay Restitution to Child Pornography Victims*, 86 N.D. L. REV. 205, 210 (2010) (discussing the history of federal criminal restitution laws).

⁴⁰ Brief on Petition for a Writ of Certiorari Amy, the Victim in the “Misty” Child Pornography Series at 8 *see also*, 18 U.S.C.A § 3663(a) which orders the defendant to pay restitution

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense.

⁴¹ *United States v. Monzel*, 641 F.3d 528, 530 (D.C. Cir. 2011).

⁴² 18 U.S.C.A. §2259 (West 1996).

⁴³ *Ontiveros*, at 2.

18 U.S.C.A. section 2259 also requires that the court order restitution without considering the economic circumstances of the defendant or whether the victim received compensation for his or her injuries from the insurance or other sources.⁴⁴

The issue that has split many circuits is the proximate cause requirement.⁴⁵ The statute states:

(3) Definition. For purposes of this subsection, the term “full amount of the victim’s losses” includes any costs incurred by the victim for (A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorney’s fees, as well as other costs incurred; and (F) any other losses suffered by the victim as a proximate result of the offense.⁴⁶

The split among the courts mainly rests on subsection (F) and whether or not the requirement for proximate cause should only be applied to subsection (F), or if Congress intended the proximate cause requirement to apply to subsections (A) through (E) as well. Part III of this note will analyze the inconsistent decisions regarding this issue.

PROXIMATE CAUSE REQUIREMENT

When evaluating the plain language of the statute, it is unclear whether Congress intended that a proximate cause requirement for all injuries listed in the statute applies or, whether the proximate cause

⁴⁴ 18 U.S.C.A. §2259 (West 1996).

⁴⁵ *Proximate Cause*, THE FREE DICTIONARY BY FARLEX, (2008), available at <http://legal-dictionary.thefreedictionary.com/But+for+causation>. (defines proximate cause as An act from which an injury results as a natural, direct, uninterrupted consequence and without which the injury would not have occurred. Proximate cause is the primary cause of an injury. It is not necessarily the closest cause in time or space nor the first event that sets in motion a sequence of events leading to an injury. Proximate cause produces particular, foreseeable consequences without the intervention of any independent or unforeseeable cause. It is also known as legal cause. To help determine the proximate cause of an injury in Negligence or other tort cases, courts have devised the “but for” or “sine qua non” rule, which considers whether the injury would not have occurred but for the defendant’s negligent act. A finding that an injury would not have occurred but for a defendant’s act establishes that the particular act or omission is the proximate cause of the harm, but it does not necessarily establish liability since a variety of other factors can come into play in tort actions. Some jurisdictions apply the “substantial factor” formula to determine proximate cause. This rule considers whether the defendant’s conduct was a substantial factor in producing the harm. If the act was a substantial factor in bringing about the damage, then the defendant will be held liable unless she can raise a sufficient defense to rebut the claims.).

⁴⁶ 18 U.S.C.A. § 2259 (West 1996).

requirement was only intended for subsection (F), which includes “any other losses suffered by the victim as a proximate result of the offense.”⁴⁷ Most of the discrepancies in the awards granted by the courts are a reflection of this uncertainty.

Courts Applying Proximate Cause to Subsections (A) through (F) of 18 U.S.C.A. 2259

Many courts have read section 2259(b)(3)(F) as applying the phrase “suffered by the victim as a proximate result of the offense” to all of the types of losses listed in section 2259(b)(3).⁴⁸ The court, in *United States v. Monzel*, applied the traditional principles of tort and criminal law, which state that the defendant is only liable for the harms he proximately caused.⁴⁹ The *Monzel* court stated that the purpose of the proximate cause rule is that “legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.”⁵⁰ Another argument that supports the proximate cause requirement on all subsections is in *United States v. McDaniel*; there, the court explains the construction of words in a clause: “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.”⁵¹

In *United States v. Aumais*, the court recognized this explanation, and further added that the phrase “as a proximate result of the offense” equally applies to, among other things, medical care, attorney fees, and lost income as it would to “any other losses.”⁵² The court explained that proximate cause limits the responsibility of the defendant for the consequences of the defendant’s own actions demanding some “direct relation between the injury asserted and the injurious conduct alleged.”⁵³ The Ninth Circuit Court of Appeals in *United States v. Kennedy* stated that the definition of “victim” according to the VWPA and the MVRA includes the terminology of being “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.”⁵⁴ Because of the wording of that definition, the court

⁴⁷ *Id.*

⁴⁸ *Aumais*, 656 F.3d at 152.

⁴⁹ *Monzel*, 641 F.3d at 535.

⁵⁰ *Monzel*, 641 F.3d at 535-36.

⁵¹ *McDaniel*, 631 F.3d at 1209 (quoting *Porto Rico R., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)).

⁵² *Aumais*, 656 F.3d at 153.

⁵³ *Id.*

⁵⁴ *Kennedy*, 643 F.3d, at 1261.

held that restitution should be awarded only in circumstances where the conduct of defendant was the “actual and proximate cause.”⁵⁵ In section 2259(b), the enforcement of the restitution order is issued and enforced “in accordance with section 3664 in the same manner as an order under section 3663(a).”⁵⁶

The *Kennedy* court acknowledged that the three statutes have similar restitutionary purposes so the proximate cause requirement would naturally flow into section 2259.⁵⁷ The wording in section 2259(c) defines “victim” as an individual harmed “as a result of”—this language implies that the government intended to establish a causal connection between the injury and the actions of the defendant.⁵⁸ However, the counter argument is that in the definition of “victim” within section 2259, if Congress had intended that the proximate cause requirement was to cover all of the victim’s losses, the wording “proximately harmed” would have been added; yet, it was not.⁵⁹ The government proved that Kennedy had viewed the images (of Amy and Vicky), and established that he contributed to the generalized harm; however, the government was unsuccessful in connecting the injury of the victims to the actions of the defendant.⁶⁰ The court further added that it has not found a case where the “relationship as remote as that between Kennedy’s conduct and the victims’ losses . . . held sufficient for an award of restitution.”⁶¹ The government in *Kennedy* failed to show how Kennedy’s action of transporting the images of child pornography caused Amy’s lost income or Vicky’s future counseling costs.⁶² The government could not show evidence that Amy and Vicky were aware of Kennedy’s conduct.⁶³ For those reasons, the Ninth Circuit vacated the order granting restitution.⁶⁴

Courts Applying the Proximate Cause Requirement Only to Subsection (F)

Some courts, like the Fifth Circuit Court of Appeals in *In re Amy Unknown*, have determined that other courts erred when applying the proximate cause requirement to all subsections (A) through (F).⁶⁵ The

⁵⁵ *Id.*

⁵⁶ 18 U.S.C.A. § 2259 (West 1996).

⁵⁷ *Kennedy*, 634 F.3d at 1262.

⁵⁸ *Kennedy*, 634 F.3d at 1260.

⁵⁹ *Id.* at 1261.

⁶⁰ *Id.* at 1264.

⁶¹ *Id.*

⁶² *Id.* at 1262.

⁶³ *Id.* at 1263.

⁶⁴ *Kennedy*, 643 F.3d at 1265.

⁶⁵ *Amy Unknown v. Paroline*, 636 F.3d 190, 198 (5th Cir. 2011).

district court in *United States v. Paroline* held that the proximate cause requirement was not confined to only subsection (F), but applied to each category listed.⁶⁶ Victim Amy appealed the lower court's decision and the Fifth Circuit agreed with Amy that the language and structure of section 2259(b)(3) imposed the proximate cause requirement only on the miscellaneous "other losses" that the victim was seeking to recover.⁶⁷ The court explained that Congress was aware of many types of expenses that the victims would accumulate because of the crime, but could not anticipate other types of expenses, so the proximate cause requirement was added to the "other expenses" category.⁶⁸ In *United States v. Fast*, the court stated that it would make sense "that Congress would impose an additional restriction on the catchall category of "other losses" that does not apply to the defined categories."⁶⁹ The VWPA was passed by Congress in 1982.⁷⁰ The Act defined a "victim" to be a "person directly and proximately harmed as a result of the commission of an offense..."⁷¹

In contrast, section 2259 defines a victim to be an "individual harmed as a result of a commission of a crime."⁷² It is apparent that Congress abandoned the proximate cause language to have it reach all categories of harm by dropping the words "proximately harmed" stated in the earlier statute.⁷³ This change is consistent with the intent of later restitution statutes to expand the restitution remedy and reflects a more "pro-victim" attitude.⁷⁴ The court in *United States v. Fast*, addressed the changes to the statutes and stated that the "evolution in victims' rights statutes demonstrates Congress's choice to abandon a global requirement of proximate causation."⁷⁵

The statute lists different types of costs in sections (A) through (E) that the victim may have incurred, and ends with section (F) that states as a catchall "any other losses suffered by the victim as a proximate result of the offense." The courts have wrestled with the question as to whether the proximate cause requirement applies to all of section 2259(b)(3)(A) through (F) or only the catchall subsection (F). Some courts apply the proximate cause requirement to all subsections and either award a small

⁶⁶ *Amy Unknown*, 636 F.3d at 198.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *United States v. Fast*, 820 F. Supp. 2d 1008, 1009 (D. Neb. 2011).

⁷⁰ Jaques, *supra* note 31, at 1178 (discussing the proximate cause requirement for the catchall phrase).

⁷¹ 18 U.S.C.A. § 3663 (West 2008).

⁷² 18 U.S.C.A. § 2259 (West 1996).

⁷³ *Amy Unknown*, 636 F.3d at 199.

⁷⁴ *Fast*, 820 F. Supp. 2d at 1009.

⁷⁵ *Id.* at 1010.

amount or zero restitution to the victim, while other courts apply the proximate cause requirement only to subsection (F) and award extremely large awards of restitution. This confusion over the proximate cause requirement has caused great discrepancies in the amounts of restitution awarded.

AWARD CALCULATIONS

Under section 2259(b)(1), for an award of restitution to be ordered, the court must make three determinations: “(1) that the individual seeking restitution is a ‘victim’ of the defendant’s offense, . . . 2) that the defendant’s offense was a proximate cause of the victim’s losses . . . and (3) that the losses so caused can be calculated with ‘some reasonable certainty.’”⁷⁶

The courts are in dispute as to whether section 2259 allows the victim to recover only for the losses that can be attributed to the injury caused by the offender or whether it allows the victim to recover for the full amount of her losses without taking into account the contribution that the offender has directly made.⁷⁷ 18 U.S.C.A. section 2259 mandates that the court award restitution to victims “in the full amount of the victim’s losses” and does not allow the court to decline the order because of “(i) the economic circumstances of the defendant; or (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.”⁷⁸ 18 U.S.C.A. section 3664(h) governs the awards of restitution under section 2259, and states that the court “may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim’s loss.”⁷⁹ The decision of the court whether to hold the defendant as jointly and severally liable or to apportion the restitution among all of the defendants is within the court’s discretion.⁸⁰

In *United States v. Nucci*, after pleading guilty to conspiracy and use of a firearm during a robbery, the court ordered Nucci to pay the restitution amount of \$34,476 under the MVRA and 18 U.S.C.A. section 3664.⁸¹ The victims of Nucci’s crimes only suffered monetary losses.⁸² The judge ordered Nucci to pay the value of the items that were stolen

⁷⁶ *Kennedy*, 643 F.3d at 1261.

⁷⁷ *Klein*, 829 F. Supp. 2d at 605.

⁷⁸ 18 U.S.C.A. § 2259 (West 1996).

⁷⁹ 18 U.S.C.A. § 3664 (West 2002).

⁸⁰ *United States v. Nucci*, 364 F.3d 419, 422 (2nd Cir. 2004).

⁸¹ *Id.* at 420.

⁸² *Id.*

from his victims.⁸³ The court held that it was proper for Nucci to be held jointly and severally liable for the full amount of the restitution.⁸⁴ Nucci's concern was that the failure of the court to offset the restitution by other co-defendants could create a possibility that the victim could "receive a windfall by being overcompensated."⁸⁵ In section 3664(h), the statute states that:

If the court finds that more than one defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.⁸⁶

The statute does not expressly prevent double recovery.⁸⁷ However, the court in *Nucci* suggested that, at common law, joint and several liability does not permit "double-recovery."⁸⁸ The court restated that "[t]he effect of joint liability in a tort context is to excuse one defendant from paying any portion of the judgment if the plaintiff collects the full amount from the other [defendant]."⁸⁹ Section 3664(k) implies that the court can apply joint and several liability because it allows courts to readjust orders of restitution once the victim receives the full amount of her losses.⁹⁰ With that understanding, the argument of the offender concerning double recovery is moot. Joint and several liability allows victims like Amy and Vicky to collect restitution for the harms caused by offenders who acted separately.⁹¹

Unlike in *Nucci*, where the co-defendants were involved in the same case, in *United States v. Monzel*, the court expressed confusion as to whether joint and several liability could be imposed upon defendants in different cases.⁹² The court stated that "it is unclear, however, whether joint and several liability may be imposed upon defendants in separate

⁸³ *Id.*

⁸⁴ *Id.* at 422.

⁸⁵ *Id.*

⁸⁶ 18 U.S.C.A. § 3664(h) (West 2002); *see also* *United States v. Squirrel*, 588 F.3d 207, 212 (4th Cir. 2009) and *United States v. Moten*, 551 F.3d 763, 768 (8th Cir. 2008) (stating where a court issuing restitution held each defendant liable for the full amount of restitution by imposing joint and several liability).

⁸⁷ *Nucci*, 364 F.3d at 423.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *In re Unknown*, No. 09-41238, 2012 WL 447744, at *17 (5th Cir. 2012).

⁹¹ *Id.* at *16.

⁹² *Monzel*, 641 F.3d at 539.

cases.”⁹³ Although nothing in the statute forbids joint and several liability upon defendants in different cases.⁹⁴

In *United States v. Aumais*, the court originally ordered Aumais to pay \$48,483 in restitution to cover Amy’s future counseling costs.⁹⁵ The magistrate judge determined that the “harm from the uncle’s abuse and that from possession of the images . . . cannot be separate[d] to allocate costs between them . . . Amy will require counseling for both.”⁹⁶ The Court of Appeals for Aumais reversed the order granting restitution holding that if Amy would need counseling for both the harm of the initial abuse and for the harm based on the possession of the images, Aumais could not be held responsible for all of Amy’s losses.⁹⁷ The court found that the wording in section 2259 called for the full amount of the victim’s losses as a result of the offender’s possession.⁹⁸ The *Aumais* court suggested that section 3664(h) imposes joint and several liability only when a single judge is dealing with multiple defendants in a single case.⁹⁹ The expressed language in the statute, however, does not support this understanding.¹⁰⁰ The court admitted that the statute “does not contemplate apportionment of liability among defendants in different cases, before different judges, and in different jurisdictions around the country.”¹⁰¹

In *United States v. Lundquist*, the court disagreed with the understanding of joint and several liability in *Aumais*.¹⁰² The court held that although Amy’s Victim Impact Statement was drafted a year before the defendant was arrested, psychological reports after the arrest determined that her knowledge of individuals exchanging and the viewing of her photographs over the internet re-victimized her.¹⁰³ The *Lundquist* court held that although other defendants had been convicted and found to have contributed to Amy’s losses, nothing in the statute states that the defendants must be in the same case and before the same

⁹³ *Id.*

⁹⁴ *In re Unknown*, 2012 WL 447744, at *16.

⁹⁵ *Aumais*, 656 F.3d at 155.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Aumais*, 656 F.3d at 156.

¹⁰⁰ 18 U.S.C.A. § 336(h) (West 1982) (stating that if the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim’s loss and economic circumstances of each defendant).

¹⁰¹ *Aumais*, 656 F.3d at 156.

¹⁰² *Lundquist*, 847 F. Supp. 2d, at 379-80.

¹⁰³ *Id.* at 372.

judge to have joint and several liability ordered.¹⁰⁴ The *Lundquist* court further stated that Amy would never be able to fully recover for all of her losses, unless presiding judges would find joint and several liability against other defendants on trial in other cases, because of the likelihood that few defendants would have the financial means to pay the ordered restitution.¹⁰⁵

The court found it fair to hold one defendant liable for the full amount of the restitution, rather than apportioning the liability among all of the offenders for four reasons.¹⁰⁶ The first reason is that given the likely decrease in the share of the responsibility of each new defendant, and the fact that the defendants are unlikely to have sufficient funds, the only way that the victim can be made whole is through joint and several liability.¹⁰⁷ The second reason for holding the defendant liable for the full amount of restitution is because any “perceived unfairness” is minimized by the fact that the court will qualify the order so that the defendant would only pay the amount remaining of the loss and discount the total with any amounts paid by others.¹⁰⁸ The third reason addresses the concern that a victim may receive “double recovery” but is minimized or eliminated by the fact that the court directs the government to keep track of payments made that involve numerous jurisdictions across the country.¹⁰⁹ The court commented that it was confident that Amy’s representative and government officials possessed the resources to determine both how much Amy had received in restitution and what losses the money was intended to cover.¹¹⁰ The *Lundquist* court noted that individuals had already started keeping track of these items so that “double recovery” can be avoided.¹¹¹ The fourth reason acknowledges that some prior cases argued that large restitution claims violated the Eighth Amendment of the United States Constitution. In *Lundquist*, the court responded to this concern by stating that the restitution is remedial, not punitive.¹¹² Although in some cases, the restitution order may seem “harsh,” the order is neither “(a) grossly disproportionate to the very serious crime of receiving and possessing child pornography, nor (b) unusual in the constitutional sense.”¹¹³ For these reasons, the court found

¹⁰⁴ *Id.* at 380.

¹⁰⁵ *Id.* at 381.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Lundquist*, 847 F. Supp. 2d at 381.

¹⁰⁹ *Id.* at 382.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

that joint and several liability was proper.¹¹⁴ The court ordered Lundquist to pay the remaining portion of \$3,381,159.00 to Amy that had not already been paid by previous offenders.¹¹⁵ The total loss was then broken down to include future counseling expenses in the amount of \$512,681.00, lost wages and benefits in the amount of \$2,855,173.00, and attorney's fees and other costs to total \$17,063.00.¹¹⁶

For those courts that have not applied joint and several liability to the defendant(s), many have struggled with the method for calculating a restitutionary award under section 2259.¹¹⁷ The Eleventh Circuit affirmed the ruling in *United States v. McDaniel*, awarding restitution of \$12,700, even though the mechanism for calculating the awarded amount could not be explained.¹¹⁸ In *United States v. Monzel*, the court repeated the decision in *United States v. Doe*, stating, "where the harm is ongoing and the number of offenders impossible to pinpoint, such a determination will inevitably involve some degree of approximation."¹¹⁹ The courts are asked to estimate, based upon the facts presented, to award an amount with "reasonable certainty."¹²⁰ The court in *Kennedy* suggested developing a reasonable estimate as to the number of offenders that would possibly be prosecuted over the lifetime of the victim and divide that number into the total amount of the victim's losses.¹²¹

ALTERNATIVES

Various judges when determining awards of restitution interpret the statutory language of section 2259 differently. Some courts have awarded nothing to the victims, while others have awarded the victim in excess of three million dollars. A major question is: what happens to the offender who has images when the child victim cannot be identified? The intention and purpose of the statute is legitimate and vital; however, the confusion of the proximate cause interpretation, and the absence of guidelines for calculating awards of restitution, have added confusion to this situation. In *Kennedy*, the prosecution suggested a flat fine of one thousand dollars per image.¹²² The court dismissed this idea because it found no evidence to suggest that the amount was the "full amount of

¹¹⁴ *Lundquist*, 847 F. Supp. 2d at 383.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 376-77.

¹¹⁷ *Kennedy*, 643 F.3d at 1265.

¹¹⁸ *Id.*

¹¹⁹ *Monzel*, 641 F.3d at 540.

¹²⁰ *Id.*

¹²¹ *Kennedy*, 643 F.3d at 1266.

¹²² *Id.* at 1264.

[Amy and Vicky's] losses."¹²³ The court found no support for a one thousand dollar per image fine by the current wording within the statute; however, the argument can be made that the statute be amended to remove the wording that awards the victim the "full amount of victim's losses" and be replaced with a flat fine per image to be paid to the victim, up to the full amount of the victim's losses. If the offender's images are able to be identified and linked to a particular victim, then the money for each image could be paid directly to the identified victim—up to the total amount of the victim's losses. If the victim is unable to be identified at the time of the conviction of the offender, then the fines for the unidentified victims can be deposited into a federal fund set up for the victims. If the unidentified victim is later identified, then that victim could apply to the fund to be paid an award of restitution. With this type of system in place, every offender would be fined for each and every image he possesses. As of now, an offender who is convicted of possessing multiple images of child pornography lucks out if none of the victims depicted in those images are identified. With a flat fine for each image possessed, every offender pays.

A possible concern is that a victim may receive more than his or her loss. However, this concern is easily overcome because the payments the offender is ordered to remit can be made through the state or federal system that can be monitored, not exceeding the total amount of losses. Similar to the current process, the victim would identify the types and amount of total losses in a Victim Impact Statement. This statement could be kept on file with the state so that the notifications that are currently sent to the victims each time an offender is arrested with his or her images could instead be sent to the manager of the child pornography victims' fund to allow disbursement of the restitution award to the victim once it is collected from the offender.

The CVRA specifies that the government must notify the victims upon an arrest if their images are obtained; this seems to add to the recurring pain and suffering by the victim. However, if the victim were allowed to have the notification letters bypass his or her mail, and assign the letters to go to the foundation that is set up to manage the funds, the victim would not have the daily reminders sitting in his or her mailbox that could reopen wounds.

CONCLUSION

The intention of the statute is genuine; however, the application is not consistent. If Congress were to review the decisions of the different

¹²³ *Id.*

circuits, it would become aware of the fact that the wording of the statute is causing great confusion. Although the purpose of the statute is clear, revisions must be made to encourage consistency and proper compensation for victims who have already suffered immense pain. Congress has the power to revise the wording in the statute to clarify the proximate cause requirement, and to specify whether joint and several liability or a different type of calculation method would be appropriate when courts order awards of restitution. It is likely that every sitting judge on the bench who hears the injuries that are repeatedly inflicted upon the victims of child pornography will want to ease the pain and suffering by awarding financial compensation; however, because the wording of the statute is ambiguous, sometimes justice is not served. Attorney Christopher G. Green, in his brief to the United States Supreme Court, representing the National Center for Missing and Exploited Children, stated it best, “[u]ntil the Court provides clarity, child pornography victims will face uncertain prospects for the recovery of their losses even as they continue to be exploited by offenders nationwide.”¹²⁴ Child pornography victims deserve to have a line of consistent rulings; and society as a whole should not sit back and allow the continued confusion that section 2259 has caused.

¹²⁴ Brief on Petition for a Writ of Certiorari for Amy, the Victim in the “Misty” Child Pornography Series at 6.